IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Petitioner	)	
	)	MC No. 06-10427
-VS-	)	MC No. 06-10449
	)	MC No. 06-10439
JEFFREY SHIELDS, CHARLES PEAVY,	)	Pages 1 - 61
JOEL WETMORE,	)	
	)	
Respondents	)	

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
September 17, 2007, 3:15 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
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A P P E A R A N C E S:

MARK T. QUINLIVAN, ESQ., Assistant United States Attorney, Office of the United States Attorney, 1 Courthouse Way, Boston, Massachusetts, 02210, for the Petitioner.

PAGE KELLEY, ESQ., JUDITH H. MIZNER, ESQ., and WILLIAM FICK, ESQ., Federal Defender Office, 408 Atlantic Avenue, Boston, Massachusetts, 02210, for the Respondents.

ALSO PRESENT:

HELEN H. HONG, ESQ., Department of Justice, Civil Division, Washington, D.C.

P R O C E E D I N G S

THE CLERK: The case of the United States V. Jeffrey Shields, Miscellaneous Case No. 06-10427, United States V. Charles Peavy, Miscellaneous Action No. 06-10449, and United States J. Joel Wetmore, Miscellaneous No. 06-10439, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. QUINLIVAN: Good afternoon, your Honor. Mark Quinlivan for the United States. With me at counsel table is Helen Hong from the Civil Division of the U.S. Department of Justice.

THE COURT: Welcome.

MS. MIZNER: Judith Mizner appearing for all of the respondents, along with William Fick and Page Kelley who are actually representing the three respondents.

THE COURT: Okay, great. Have you set up a schedule between you? I sort of assume that it's your motion, so --

MS. MIZNER: Thank you, your Honor. First, I would like to provide --

THE COURT: Actually, what is this formally? It's a motion to --

MS. MIZNER: This is a motion to dismiss --

THE COURT: To dismiss.

MS. MIZNER: -- challenging the civil commitment

statute on its face. And I would like to provide the Court with copies of two opinions. One is an opinion issued by Judge Tauro, and the other is an opinion from the Eastern District of North Carolina by Judge Britt, both of which address the same issues.

THE COURT: Thank you for those copies. I have read them. I just saw them this morning, so I don't pretend to be expert on --

MS. MIZNER: In an excess of caution, your Honor.

THE COURT: Especially on the North Carolina one, it's very lengthy, and I've just had a chance just to skim it, but you can assume I've at least got the highlights for both of those opinions.

MS. MIZNER: Thank you. This is a motion to dismiss challenging the constitutionality of the Jimmy Ryce Civil Commitment Program, which is part of the Adam Walsh Act. The statute, which is codified in the Criminal Code at 18 U.S.C. Sections 4247 and 4248, provides for the open-ended potentially lifetime commitment of certain classes of persons on a finding by a judge based on clear and convincing evidence that they are sexually dangerous persons. And if the statistics from states with civil commitments for sexually dangerous persons is any indication, fewer than 10 percent of those committed have been discharged from custody to date.

Now, there are three classes of persons covered by the federal statute: those in the custody of the Bureau of Prisons; persons committed to the custody of the Attorney General pursuant to 4241(d), which addresses incompetent criminal defendants; and persons as to whom criminal charges have been dismissed solely for reasons relating to mental conditions. It is not limited to persons who are in custody for sex crimes or to persons who have been convicted for sex offenses.

The definition of sexually dangerous person is "Engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others."

"Sexually dangerous to others" is defined as, "The person suffers from serious mental illness, abnormality, or disorder, as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation, if released." There is no further definition in the statute of those terms.

The Bureau of Prisons in December issued a memorandum with interim definitions, and those have subsequently been set out in the Federal Register. The citation alludes me, but it is the same definition, and we can provide that citation to the Court, but it in essence defines sexually violent conduct as including "engaging in

any conduct of a sexual nature with another person with knowledge of having tested positive for the human immunodeficiency virus, or other potentially life-threatening sexually transmissible disease, without the informed consent of the other person to be potentially exposed to that sexually transmissible disease." So it certainly encompasses conduct that exceeds what you would normally view as violent.

THE COURT: So that's -- maybe I read it too quickly. Is that cite in your brief?

MS. MIZNER: No, it's not. I will provide it to your Clerk.

THE COURT: If you could. Do the regulations address other things like the procedures to be followed and the timing of these certifications?

MS. MIZNER: Yes, those are -- the Federal Register has a -- there's a proposed rule in the Federal Register that addresses --

THE COURT: Which provides what?

MS. MIZNER: Well, some of the procedures are set out in the statute.

THE COURT: Right, but let me just -- I understand your really, an excellent brief on everyone's part, broad-brush attack on so many fronts. To the extent, though, that there's a procedural due process challenge, and a sort of

one of the more typical -- not typical but easier conceptual ones is the lack of a hearing before you're actually held, is there a regulation that actually addresses that?

MS. MIZNER: I do not believe there is. The statute does not provide for any particular -- does not provide -- it provides for a time frame of --

THE COURT: Does it fill in the gaps; in other words, that you have to have a hearing by a neutral decision-maker before you're actually held past your prison date?

MS. MIZNER: No. No, to my knowledge, the regulation does not provide those kinds of gaps, and those addressing that issue, those are the --

THE COURT: You know, I'll let them address. I don't want to hold up your argument.

MS. MIZNER: That's okay, that's part of the argument.

THE COURT: So once you were in the register, I hadn't known that the Department of Justice had actually issued any proposed regulations.

MS. MIZNER: It's 72 Federal Register --

THE COURT: I'll find it.

MS. MIZNER: I have it somewhere.

THE COURT: Okay.

MS. MIZNER: But the procedures in the statute

provide for certification which then stays the release of the person. It is then sent to -- the certification is sent to the court in the district of confinement, which is why we're here. The clerk is to send notice to the person and the attorney for the government, and the court orders a hearing. Prior to any hearing, the courts may order a psychiatric or psychological examination and the filing of a report. And the examination is defined in 4247(b) as being done by a licensed or certified psychiatrist or psychologist or more than one with the defendant able to select an additional examiner.

THE COURT: Can you tell me a little bit about the three men who are in front of me now? Were they actually certified before the end of their prison sentence?

MS. MIZNER: Yes, but very close -- I'll let Mr. Fick and Ms. Kelley address that.

THE COURT: Can I just find out what happened in real life.

MR. FICK: At my fingertips, I don't have the exact dates. In Mr. Peavy's case, though, it was a matter of days or weeks, I believe, before his release date. I want to say his release date was in October or November of '06, and the docket would reflect the day the paper hit the court.

THE COURT: And have you -- just I noticed one of

the judges in addressing one of these kind of cases, actually while probing the very, very difficult constitutional issues, made sure that there was at least probable cause with respect to the people in front of him, and there was a little bit of a back-and-forth in footnotes about whether or not that had been waived or not with respect to each individual defendant. So assume for a minute that you're one of these people, would you want any kind of a probable cause hearing while I'm working through the constitutional issues?

MR. FICK: Potentially I think, your Honor, the answer would be "yes." What we had agreed to the government in initial discussions --

THE COURT: I'm sorry to jump in here, but --

MS. MIZNER: No, that's fine.

MR. FICK: We had talked about how we would not argue to the Court that because of -- we would not argue that there was something unconstitutional in the delay required to adjudicate the motion to dismiss. However, our understanding was that that would not in any way waive the argument, which is part of the motion in fact, that there ought to be a probable cause hearing, and the lack of a probable cause provision in the statute is one of the constitutional defects of the statute. And to the extent the Court were inclined to ingraft onto the statute a

probable cause requirement, I think we would certainly want to reserve the option of going forward with that for each of the clients, depending on the specific circumstances. We'd have to think about that strategically for each one, I think.

THE COURT: All right. Well, the reason I say that is, apparently the case was argued in North Carolina last May -- I was looking -- and I don't know how quickly Judge Tauro must have turned the thing around. I think you all really did -- I have to congratulate you -- a fabulous briefing, but it took a very long time, and then it made no sense at that point to start with the old clerks and move to the new clerks. But that having been said, it could take another month or two anyway to write some sort of opinion, and your people are just sitting in jail, so what is your view on all that on the probable cause determination?

MR. QUINLIVAN: Thank you, your Honor. May it please the Court, we are not opposed to that. In fact, it was my understanding when the schedule was initially set that the respondents were disavowing any sort of hearing until the constitutional questions were adjudicated, but it's always been our position that we are not opposed and we're ready to go forward with a hearing.

THE COURT: But I'm not talking about the big mega hearing. I noticed the softest piece of your brief is sort

of, "Let's work out the procedural piece as we go." And you did not flat out say that there shouldn't be some sort of a probable cause hearing on the lines of -- a bad analogy but a probation revocation, at least something, some neutral person other than somebody at BOP saying that this person should be held. And I think, at a bare minimum, I would like to, without waiving any rights on their part, give these gentlemen, who have been sitting in jail for a while, right, just while this thing has been briefed, this very important set of constitutional issues, the right to do that, without waiving any rights that somehow that that obviates a facial challenge to the procedures or the other constitutional kinds of issues. So do we all agree? That's sort of one key thing I wanted to accomplish here today because it's been a longish period of time for the briefing.

MR. QUINLIVAN: That's agreeable to the government.

THE COURT: Is that agreeable to everyone here that you'll go back and discuss with your clients whether or not you want such a probable cause hearing?

MS. KELLEY: Yes. And if I may just briefly say, I have another client before Judge Tauro, but all of my clients were certified either on the day of their release or within days of their release dates. Mr. Wetmore to my left and Mr. Shields to my right were both at halfway houses very

assiduously following the rules there, lining up apartments and jobs and treatment programs for when they were to be released, and they were just arrested out of the blue from the halfway houses and taken to Fort Devens.

THE COURT: Taken where to Fort Devens?

MS. KELLEY: They are incarcerated at the prison at Fort Devens.

THE COURT: In a treatment center or at the farm?

MS. KELLEY: There is no treatment center there. There is what they call a sex offender management program, which is, I think, a very optimistic title, that I don't think there's any treatment component whatsoever. It's just, I think, really for people who are there --

THE COURT: So they're not seeing psychiatrists or whatever?

MS. KELLEY: No, and I think they're just stigmatized by being labeled under the rubric of that program.

THE COURT: Sure, I will get back to the broad facial, but your representation is that none of the three men in front of me now are receiving any treatment?

MS. KELLEY: Well, that's correct, although another problem -- the probable cause hearing question becomes very complicated because to certify these men, the government used for two of my three clients their treatment

records as a basis for their certification, which we would be challenging. We'll be challenging the use of those records.

THE COURT: Your two people were in for some sort of sex offense?

MS. KELLEY: Yes, child pornography.

THE COURT: The possession or receipt?

MS. KELLEY: Yes.

THE COURT: Not touching?

MS. KELLEY: Right.

THE COURT: And what about, is there anyone here who was brought in purely on a like a drug case or an immigration case or some sort of other non-sex kind of --

MR. FICK: Mr. Peavy, the actual charge for which he pled was a simple assault, for which he received a six-month sentence. The simple assault was on a nurse in a psychiatric facility, and there is sort of a history of other types in his criminal history, but the actual instant charge for which he was in BOP custody was a six-month simple assault.

THE COURT: Sure, but I guess, of course, if he goes in a treatment facility, he's actually sort of in his own category at this point, right, because he's got a mental illness?

MR. FICK: Well, there are certainly some

disabilities, I would put it, yes. And so while he's receiving treatment, I think, ongoing for just the consequences of his stroke and other issues that he has, there's no sort of sexually dangerous person type treatment going on at Devens that I'm aware of, and in fact that would be problematic while the petition is still pending because there's the issue of --

THE COURT: A, it's not being offered, but, B, you're not seeking it?

MS. KELLEY: Well, we would definitely be seeking it. The problem is, it's just a form of suicide, and in fact --

THE COURT: I understand that. Given the procedural posture of where we are right now, A, it's not been offered, but, B, you don't want it for right now. Does everyone agree that that's the record? Is it correct that Devens hasn't been offering it, from the government's point of view?

MR. QUINLIVAN: Your Honor, I'm not familiar with the specific treatment plans of these three individuals, so --

THE COURT: Well, as you stand here -- this is something Justice Breyer thought a lot about -- as you stand here, are there treatment facilities that are available?

MR. QUINLIVAN: There are treatment facilities

that are available. I do not know whether any of the three respondents in this case have either availed themselves or if they have been put in any of those treatment programs. I can't -- I don't know the particulars of these three cases, what treatment they may have had.

THE COURT: Let me ask more broadly: Is there anyone in the United States of America who's been certified under this new Act who has been offered treatment?

MS. MIZNER: I'm not aware of any.

MR. QUINLIVAN: Your Honor, I can answer this. Actually there are 53 pending. Actually, no one has been in fact certified to date, whether in this district or in North Carolina.

THE COURT: All right, we'll get back to that. Let's go back to the facial, but I think let's do this. Within, what do you want, 30 days? Or within no later than 30 days, you'll let me know, all of you, what you want me to do with respect to a probable cause finding with your clients.

MS. KELLEY: Yes.

MR. FICK: Yes, your Honor.

MS. KELLEY: Thank you.

THE COURT: And that will be without prejudice to any constitutional issues.

The other issue you maybe want to talk about is,

if they're there, if there's any kind of treatment that they would want of some sort without waiving rights. I don't know if that's even feasible, okay, so think about that.

MR. FICK: The issue there becomes quite simply, your Honor, whether they have a Fifth Amendment right to anything that might happen in that treatment.

THE COURT: Right, it would have to be like in a presentence report where the stuff couldn't be used against you in this proceeding. I agree.

All right, back to you. Sorry. That was the one piece of housekeeping I wanted to deal with are these three people in front of me while this issues get litigated, I'm assuming not just here but on an appellate level, will take quite a while.

MS. MIZNER: It's an important issue.

THE COURT: Yes.

MS. MIZNER: Going back to the statute, it allows for the commitment for up to 45 days for the examination with and a possible extension for another 30 days. So under the statute, you can have 75 days before there is any kind of judicial hearing.

The report --

THE COURT: But let me just ask you point-blank. So if in fact, as you said, I put the judicial gloss on it, you've got to have a neutral fact-finder as in the probation

revocation cases, does that solve the problem? That solves that problem, right?

MS. MIZNER: If you have a probable cause hearing, yes.

THE COURT: Before a neutral magistrate or judge.

MS. MIZNER: Yes, absolutely. And there are cases that have addressed the time frame for probable cause hearings, 72 hours, 10 days, 15 days. Judge Selya when he was a District Court judge in Rhode Island addressed the Rhode Island statute for a commitment of alcoholics and did a fairly inclusive discussion of different time frames, and the case there was Donahue V. Rhode Island. It's not cited in the brief. It is 632 F. Supp., 1456.

THE COURT: That must be an old case.

MS. MIZNER: It is. And the statute provided for a hearing after 10 days, and he said that after doing very careful analysis of all of the pros and cons and the purposes of that particular statute and the protections of that statute, concluded that the 10 days was not too long.

THE COURT: So what's your position as far as -- let's suppose I agreed with you and you needed a neutral decision-maker. Of all the things they were vehemently opposing, that wasn't a piece of the brief that they were so vehement on, other than to say, well, we couldn't do it anyway. Do you think I have the judicial power to simply

say a neutral decision-maker must decide within 10 days of the end of the sentence, or within three days of the end of the sentence, or whatever the number seems to make sense?

MS. MIZNER: I think it would stem from the time that the certification is filed. And isn't it somewhat similar to a detention hearing? There is 72 hours.

THE COURT: Your position is, I have the right to just do that, or it invalidates the whole statute?

MS. MIZNER: Well, I think that the statute is deficient because it does not provide for that. I don't know whether the government's position is that you do not -- the statute doesn't provide for it. I believe that the courts could, as a matter of providing due process, provide a hearing.

THE COURT: We were looking to see if there were severability clauses, or what do you do if you find one piece is and one piece isn't? You say there's case law out there that simply allows me to just say it must be found or it's unconstitutional on a set of facial matters?

MS. MIZNER: Well, the question of -- we believe that Comstock is a good example of a case in which the Court addressed a facial challenge to certain issues. The challenge to the -- saying that the statute is outside is not supported, that Congress did not have the authority to pass that statute. Even if you adopt, as Judge Tauro did,

the analysis in Salerno that says a facial challenge -- to prevail in a facial challenge, you must show that the statute cannot be constitutionally applied to anybody.

Now, the Supreme Court has subsequently said that that is not the only test, and that that is perhaps not the best test for all circumstances, and in fact they have not applied it in other instances. But in Comstock, what the Court said was that when you're talking about this kind of challenge to Congress's authority to promulgate the statute, that does apply to everybody. If Congress didn't have the authority to pass the statute, it shouldn't apply to anybody, and therefore you can have a facial challenge. Similarly with due process issues, if the statute does not provide adequate due process protections, then that applies to everybody across the board.

THE COURT: I'm just simply saying that the court in North Carolina felt that the statute was invalid because Congress didn't have the authority in the necessary and proper clause. If we went that way, then you invalidate the whole statute.

MS. MIZNER: Yes.

THE COURT: But suppose you don't go that way, as Judge Tauro didn't, and the government is urging me not to, but suppose I find, though, that some of the procedural protections like the one we just discussed weren't adequate,

the remedy from your point of view would be what, to order them to do it?

MS. MIZNER: No. I believe you would have to declare the statute unconstitutional because the statute does not provide for something that the Constitution requires. And it's not just the probable cause hearing. We also have due process challenges to the standard of proof that is employed.

THE COURT: Right. So suppose you won that, you have to prove the past conduct by reasonable doubt. Let's suppose you won those two, which are stronger arguments here. It's not eviscerating the entire notion that the BOP can act or that Congress can act, but still it says you need to have a higher procedural level of protection, substantive protections. So would it be your position that if I took that position, let's say on those two points, better hearings, higher standard of proof, let's say I were to take that, you would say I have to invalidate the whole statute and Congress has to do it again? Or do I just simply say, prove it beyond a reasonable doubt, give them a hearing before they hold them on sentence? That's what I've sort of been struggling with in my mind is, if you don't win on the big knock-dead punch the way you did in North Carolina, what's the next step here? And I'm going to be asking you this too.

MS. MIZNER: Well, I don't believe that there is a severability clause in the statute, so in the absence of that, I think the Court would have to declare it unconstitutional and let Congress decide what it wishes to do in terms of a remedy.

THE COURT: Okay, thank you. If you found any case law on that, that would be useful, like another statute where the court felt that Congress had the underlying authority to do something but felt that the procedural protection wasn't high enough, for example, or timely enough. Anyway, go ahead. So unnecessary and proper, you think Congress doesn't have the authority at all?

MS. MIZNER: That's correct.

THE COURT: Did you see that comment by Justice Stevens, by the way, who by some concurrence or dissent, he essentially said, no, I'm not willing to go as far as the dissent, and the reason is because, aren't there some people who are just so dangerous that once you have them in your custody, it's almost impossible to say that society can't protect themselves and hold them?

MS. MIZNER: Well, but the question is whether this statute is the appropriate way to address that. And if you look at the breadth of this statute, I think the answer is clearly "no." It does not require -- there is no link to federal crimes here. Our federal government is one of

limited jurisdiction, and --

THE COURT: No, but let me just -- the tough case I was thinking about at home this weekend is -- and I'm not saying this applies to any of you gentlemen -- but you had someone in jail for drugs, cocaine, totally unrelated, and yet you know from his presentence report that he's molested three little girls and has confided in both Probation and people in the jail, you know, "I can't hold myself back. I know as soon as I get out I'm going to rape someone else." So you would say that Congress has no role there? I guess that's the ultimate bottom line for your opinion?

MS. MIZNER: Yes. This is not a question that's appropriately a matter of straight federal jurisdiction. And even under that parade of horribles, the fact that something's --

THE COURT: I understand that's an extreme case.

MS. MIZNER: But even under that extreme case, the fact that something is in a presentence report, or that someone says they're going to do something, doesn't necessarily mean that it's going to happen. That might perhaps provide the basis for some kind of surveillance of that individual or some kind of monitoring. Presumably they're going to be on, on your hypothetical, probably on supervised release. So it would perhaps provide for some enhanced monitoring during that time period, but it would

not necessarily provide for a statute of this stunning breadth that Congress has passed.

THE COURT: It's interesting because Justice Stevens obviously was not referring at that time to a pedophile. I think he was referring to a crazy killer type, but, still, it is something that's sort of your inherent instinct to say, if you have someone that bad in your custody and you know they're going to do something, you know, you would say there's no power from the federal government?

MS. MIZNER: I would say that is not -- our society does not work on a "lock them up first and do it later."

THE COURT: You know, I was reading over the weekend all these civil commitment cases from the Supreme Court, one after another after another, and they all say you can do that.

MS. MIZNER: They say -- they approve the states, most of these civil --

THE COURT: Right.

MS. MIZNER: And that's precisely one of the points here is that this is a function for state government. It is the state that is designed to and supposed to address these issues, not the federal government. And in fact this statute provides for the Attorney General to attempt to pawn

off --

THE COURT: To hand them off, right.

MS. MIZNER: -- to attempt to pawn them off on the states.

THE COURT: But isn't that the right answer under your theory is, you don't let them on street because you know they might do something, but then you try under the federal system provide that the state take them?

MS. MIZNER: Then perhaps you provide notice to the state and allow the state to engage in whatever process it deems fair and appropriate.

THE COURT: Oh, I see, so your view would be a handoff to the state, for them to do the civil commitment?

MS. MIZNER: Yes, if there is to be a civil commitment, it should be done by the state. And most of the states that have civil commitment statutes provide for greater protections than are provided for in this statute.

THE COURT: Yes, but suppose you were to say that. Suppose you say, yeah, you're right, there's no prior conviction here for anything, maybe just an allegation by some jailhouse stooly who says something. So then you up the ante, and that's what I'll ask them, why shouldn't it be proof beyond a reasonable doubt? But suppose you get the highest levels of proof that you can imagine and the government can meet it, you would still say that Congress

can't do it?

MS. MIZNER: Unless it's linked to a federal crime, which it is not, just as in Greenwood, the Supreme Court upheld the federal civil commitment statute where you had someone who was committed after having been indicted, but they were incompetent to stand trial, and you could -- the court said that it was permissible for a civil commitment for that purpose because the federal government had an interest in prosecuting that person at the end of the line, however long that line may be. But we don't have that here. This statute is not linked to any federal offense.

THE COURT: But wouldn't it be likely that somebody who is a repeat pedophile would be more likely to look at child pornography or try and solicit someone online?

MS. MIZNER: But looking at child pornography is not the kind of touching that --

THE COURT: But it's a federal crime.

MS. MIZNER: -- that is defined in this commitment statute.

THE COURT: Okay, so where necessary and proper, and you say under no circumstances can the federal government do it. And then if you don't win that one, you're onto it's not civil, it's criminal. I'm not sure you have to go that far because even in the civil context sometimes, you have to have a higher standard of proof.

MS. MIZNER: Right, and so --

THE COURT: So the question is, everybody at this point has sort of taken Congress at its word it's civil, but suppose it should be proof beyond a reasonable doubt for the predicate offense, if there's no prior conviction for sex crimes, the question that I have is, does that have to be before a jury if it's a civil proceeding?

MS. MIZNER: Well, again, I'm not sure that the Constitution requires it.

THE COURT: Excuse me?

MS. MIZNER: Some states have required a trial by jury, and perhaps this is close enough to a criminal proceeding, where you're talking about the consequences of up to lifetime commitment, that a jury should be required, just as you would have the increased protection of, be it proof beyond a reasonable doubt, even though it's civil, that this would be an appropriate case to impose a jury trial requirement.

THE COURT: So in the juvenile proceedings -- I can't remember -- that was still a judge decision beyond a reasonable doubt, right? It didn't need to go to a jury?

MS. MIZNER: Correct, although --

THE COURT: It may technically be civil but --

MS. MIZNER: Although some -- a number of states do provide for jury trials.

THE COURT: Sure. I think Massachusetts does.

MS. MIZNER: And that's one of the reasons why this should be left to the states which have these developed procedures.

THE COURT: Okay. Is there anything -- you can tell I've read the papers, so I'm jumping around where I was interested.

MS. MIZNER: Yes. Well, that's fine. It's always good to know what the Court is interested in.

THE COURT: Well, let me ask you this. Justice Breyer made a big deal, speaking on a five-four, on whether or not there's treatment being an important part of this.

MS. MIZNER: And I think from the statute itself, in which the Attorney General is to make efforts to pawn these people off, I don't think treatment is a big part of the government's program here.

THE COURT: So I know it's a facial challenge, and we don't really have a record, but as far as you know, there is no treatment?

MS. MIZNER: I'm not aware of any treatment that has been -- as the government said, no one has been certified yet, so it's --

THE COURT: I think in one of these opinions there was criticism of the government that they knew about these

people all along, and yet there was no treatment provided during the course of the incarceration for the underlying offense.

MS. MIZNER: I believe that there was -- treatment has been provided in the past at Butner. There was a treatment program in Butner, but I believe that's been closed and moved somewhere else now.

THE COURT: Okay.

MS. MIZNER: And there was a management program at Devens, which, as I understand it, did not provide a great deal of treatment.

THE COURT: Okay, so it's just a little -- you don't want me to get into that record. I should assume that we know nothing about treatment. Is that true?

MS. MIZNER: It's fair to say I know nothing about treatment.

THE COURT: No, I mean treatment about what's provided and what's not. You're not making any proffers on that point?

MS. MIZNER: We're not making any proffers on what treatment has been provided.

THE COURT: Okay, well, thank you. I'll give you a chance to respond.

MR. QUINLIVAN: Thank you, your Honor. If I could begin as my point of departure with actually the very first

line that my sister said because this is a facial challenge, and I think that the Salerno "no set of circumstances" test really informs all of this Court's analysis with respect to the differing constitutional standards. And I'll go through --

THE COURT: Yes, but here's my concern about on the procedural due process thing, which I thought would be the easiest. Watch, no one will think any of it's easy. I don't see how you can justify for a guy who's never been convicted of a sex offense -- take that as the cohort of people -- saying, just because the Bureau of Prisons says that there's some evidence that he meets that definition, that he can hold him without a neutral person for 75 days? That's what it sounds like.

MR. QUINLIVAN: Well, I think, and again I'm going back to the facial challenge now, I would say that it is clear that one can envision, as Judge Tauro noted, any number of situations in which a hearing could be held almost immediately or very soon after the certification.

THE COURT: But by statute -- I mean, I understand, I'm always confused a little bit about this facial challenge and when you can do it and when you can't. Let's suppose I say facially that does not provide for procedural due process, going from Goldberg V. Kelly all the way up to the present, what is the remedy?

MR. QUINLIVAN: Well, I think the remedy is that, you know, most statutes, they are presumed to be severable, and so to the extent -- we don't think that a probable cause engrafting onto the statute, that that is constitutionally necessary. But if this Court were to decide -- and I believe that when we had the first hearing in front of your Honor we provided you with -- it was an unpublished decision from the Central District of California, but the judge in that case I believe went, if not went down that path, decided that to be constitutional, there should be some probable cause hearing.

THE COURT: So you think I have the authority to simply say it's unconstitutional without a neutral decision-maker making an assessment prior to the termination of the sentence, and I don't have to invalidate the whole statutory scheme?

MR. QUINLIVAN: Well, if I could just take a step back, I mean, I don't think that's necessary because what we've pointed to is, in the Briggs case, the Supreme Court summarily affirmed the case involving a 45-day civil commitment period. So I think that, you know, it was a summary affirmance, but that still is something that the lower courts are bound to look at.

THE COURT: My problem with this scheme is, it's so far beyond at least what used to happen in Massachusetts

where I was a state court judge, or almost anywhere else, because the people don't have to have any prior convictions for a sex offense. There's nothing that's been found beyond a reasonable doubt that actually shows -- so this is actually one step beyond any of the other schemes. I know you know that. And so you don't have the proxy of a conviction to give you some assurance that actually the person is dangerous, so you've got to -- what every case has said is, yes, civil commitment for dangerousness is constitutional, assuming you have the correct procedural and evidentiary standards. I mean, it's said time and time again. So I'm worried that some of these people may just be there on a cocaine thing, and take my extreme example, someone has allegedly said something to some jailhouse rat, and he announces it, and the Bureau of Prisons thinks that's enough and holds him. Does that seem fair to you?

MR. QUINLIVAN: Well, I think that -- I mean, putting aside, you know, I think that this statute has those procedures, and if you're looking at -- I still go back to you're looking at this in a facial context. What we've had in terms of these initial certifications is a situation in which this statute was passed in July of 2006, so most of the initial certifications occurred very soon or near the person's release date. The anticipation going forward is that the Bureau of Prisons will be certifying people well in

advance of --

THE COURT: Well, is that part of these regulations?

MR. QUINLIVAN: No, it's not part of them.

THE COURT: That's what I was looking for. So why not?

MR. QUINLIVAN: Well, the only time limit, and I think my sister is correct, the only time limit that's set forth in the statute is the 45-day and then the 30-day period with respect to the mental examination.

THE COURT: But the Department of Justice could as a good government thing, not to mention the Constitution, say, but it should be all certified in time for someone to challenge it before sentence is over.

MR. QUINLIVAN: I think that that is certainly a possibility. When the statute was first put into place and the Bureau of Prisons was trying to enact this and looking at the people who were going to be released, it was impossible for that to be done with the initial certifications.

THE COURT: And I'll take your word for it because they're all night and day, but now we have all these regulations coming through to try and do it in a measured and fair fashion, and that's not even part of it. So it's of some concern, it's of concern. But let's assume I find

there should be a due process hearing before the loss of liberty, or soon, or within let's say five, ten days afterwards, can I just do that?

MR. QUINLIVAN: I don't think it's necessary, but to save the statute, if your Honor thinks that that's the only way to save the statute from a constitutional, yes, I think your Honor could do that, or your Honor on the burden of proof could sever the clear and convincing.

THE COURT: And do what?

MR. QUINLIVAN: Well, if your Honor --

THE COURT: All right, I'm pushing you. That was going to be Plan B. So suppose I say that if you had limited -- not you -- if Congress had limited the statutory scheme to people who had been convicted of sex offenses, as most of the state court statutes are, you might have one set of concerns, but here anything triggers it, right?

MR. QUINLIVAN: It does not have --

THE COURT: Any evidence. It doesn't have to be even a charge. It could just be something that someone said in a prison or a probation officer heard or something like that. You know, a probation officer heard that maybe he touched a niece or something like that, right, in an inappropriate way?

MR. QUINLIVAN: I don't think that one would be certified under those circumstances under --

THE COURT: But suppose -- see --

MR. QUINLIVAN: I would --

THE COURT: No one wants a child to be hurt on their watch, so I've got to assume that Bureau of Prisons people feel this way. So when in doubt, they're going to dump it to a federal judge, right?

MR. QUINLIVAN: I don't think that's the case, your Honor. I mean, in fact, although it's not a part of the record, I would note that, you know, there have been 53 certifications that have been made. And I misspoke earlier when I said that no one's been certified. In fact no one's been committed under the statute, but there have been 53 certifications. This statute has been on the books since July of 2006.

Now, if one looks to see that the Bureau of Prisons is looking whether or not anyone who is being released into the community meets the standards set forth in the statute and we have 53 certifications to date, I think your Honor can take judicial notice of the fact that this -- it is far from the situation your Honor envisioned where the BOP is simply passing the buck to the federal judiciary. I think that given those statistics, one could make a fair inference that it's been a very judicious application.

THE COURT: Of the 53, how many don't have convictions for sex offenses?

MR. QUINLIVAN: I don't have the answer off the top of my head. I'm sorry, your Honor.

THE COURT: Are there any in my horror parade where there's no prior convictions for a sexually violent offense?

MR. QUINLIVAN: I'm not familiar with -- I think that there are a total of nine here in this district. The majority are in North Carolina. I don't know the factual records of all 53. I'd be happy to provide that information to the Court.

THE COURT: So if I were to say that there should be proof beyond a reasonable doubt for any -- what I would call the factual portion, not the -- in other words, I see there are two kinds of findings that you have to make, right? One is whether or not they factually committed some sort of sexually violent offense, and the second is more predictive, which is, are they likely to hurt someone, or are they likely to be dangerous in the future? So if I were to say that that should be a higher standard, once again, you would say I can just do that rather than declare the whole statute unconstitutional, is that right?

MR. QUINLIVAN: I think that your Honor could sever the part of the statute that provides for a clear and convincing standard.

THE COURT: But once you sever it, I mean, it then

provides for nothing.

MR. QUINLIVAN: Well, your Honor would --

THE COURT: Then rewrite it essentially is what you're saying I should do.

MR. QUINLIVAN: Well, no. I think your Honor can -- the statute would be severed with respect to that particular aspect. I would note -- and just I don't want to necessarily move off your Honor's point, but I would note that from our perspective, the Supreme Court's decision in Addington suggests that one doesn't actually bifurcate the differing levels, that actually you look at what the standard of proof is as a whole. And in fact, even in Addington, the Court suggested that there may be some preliminary factual determinations, and yet ultimately the clear and convincing standard was held to be appropriate, because you do have -- it's application of what is inherently not a factual situation, the determination of, you know --

THE COURT: I forget, was Addington the acquitees, or were they the incompetent ones?

MR. QUINLIVAN: I'm sorry, that was for the incompetent, that's right.

THE COURT: So those were the ones where they had been indicted for some sort of crime and found incompetent, and so a lower court would have had to have found that they

actually committed the crime or not? I don't remember.

MR. QUINLIVAN: I don't think that's exactly how the statute worked.

THE COURT: All right.

MR. QUINLIVAN: It was a civil commitment statute, and in fact what the majority of courts have held following Addington -- and this is really the point of departure -- is, you have these sort of two lines of authority, and post-Addington the courts have found that the clear and convincing statute is appropriate. And I would note that even Judge Britt in his opinion in reaching a contrary conclusion cited to a Seventh Circuit decision, which we note in our brief is a pre-Addington decision.

THE COURT: That was early '70s or '80s?

MR. QUINLIVAN: That's right, that's right. But just on the procedure of -- because I do think -- I know your Honor is concerned about that, and I would just make two points. When we were before you, and I believe it was in January or February when we were first setting up the schedule, we made clear that the only -- we were willing to, you know, brief the facial constitutional challenge, that our only caveat was, we did not want this period to be counted against us in any way or held that we had waived any procedural due process protection. It was my understanding as well that the respondents affirmatively argued that they

did not want to go forward with any hearing till these -- now, I think they absolutely have the right to change that position.

THE COURT: It just has been a very long time.

MR. QUINLIVAN: It has, and I'm not -- you know, I think it absolutely has, but it has primarily because of the litigation position which the respondents chose to take, which was to make a broad facial challenge to the statute. And I believe that they have every right to change their position and at this point say, "We want to go forward with the hearing," absolutely, but --

THE COURT: But I think there are two kinds of hearings we're talking about. One is just some decision by some neutral decision-maker that there's enough to hold the person, and the second would be -- maybe you call it a hearing, but I envision it looking like a full-blown trial. Why wouldn't someone? I mean, it's almost determined an indefinite detention, right?

MR. QUINLIVAN: With the exception that a jury would not be constitutionally required.

THE COURT: But would it be permitted; in other words, if a court wanted a jury?

MR. QUINLIVAN: I haven't thought about that question. I think your Honor is -- I can see your Honor channeling Judge Young. I can see that. I should have

thought of that question because I'm sure he would have presented that as well.

THE COURT: Don't forget, the state courts here in Massachusetts have a right to a jury trial.

MR. QUINLIVAN: That's right.

THE COURT: I can't remember if it's by statute or by state constitution, but that's the way it's done in our state.

MR. QUINLIVAN: That's right. I don't think it's required. Whether if a court wanted to go forward with one, I don't have an answer. Certainly it's not provided for in the statute. In our view, it's not constitutionally required.

THE COURT: Well, assume every judge so far has basically said it's civil because it says it's civil, even though it has a lot of stigma and certainly penalties in the sense of they're in jail. "Penalties" may be the wrong word. It has certainly a huge restriction on liberty. But just because you call it civil, I think Winship makes clear you can still make it proof beyond a reasonable doubt, right?

MR. QUINLIVAN: That's right.

THE COURT: All right. And once it's proof beyond a reasonable doubt, does that then trigger a right to a jury trial?

MR. QUINLIVAN: No, I don't think it does. I think that what's constitutionally required is set forth in the Seventh Amendment, and this is not considered one of the proceedings, and this would not be the kind of proceeding in equity that historically has been held to require a jury trial. So I would start with that premise. But, again, when even in your Honor's invocation of Winship, I note that Winship is pre-Addington, and we submit that Addington is the correct point of departure for determining the burden of proof in this instance.

THE COURT: What's alluding me is exactly -- there were some procedural protections in Addington that didn't happen here, and I can't remember exactly what they were.

MR. QUINLIVAN: If I could just address briefly, your Honor did raise the question of the civil versus criminal, and I would point out that it seems -- my understanding is that a lot of the argument that's been made is that, you know, it's been placed in 18 U.S.C. I don't think that's much of an argument for two points. First off, the provisions which surround this are all civil provisions, and in addition --

THE COURT: But I don't have to decide that because you can require proof beyond a reasonable doubt in a civil proceeding.

MR. QUINLIVAN: Oh, that's right. I -- that's

right.

THE COURT: It matters for them for ex post facto and that sort of thing.

MR. QUINLIVAN: That's right.

THE COURT: But for me, I keep coming back to every single Supreme Court case where the justices say, we think it's appropriate in a civil commitment proceeding but only if you have adequate levels of procedural and evidentiary protections because of how severe the restraint on liberty is. And that's what I'm struggling with here.

MR. QUINLIVAN: And I would submit that, again, I think that the debate that we have on the standard is whether we're talking about Winship or Addington being the point of departure, and I think it is Addington, and I think that what Judge Britt was focused on was -- again, he almost bifurcated the analysis and said that, you know, you would have to have reasonable doubt for the preliminary determination, regardless of whether when you then get into the determination of and mental evaluations, that might suggest, per Addington, that it is something that can't be beyond a reasonable doubt.

THE COURT: Is it true, as the other side argues, that this is the only statute in the United States among all these that doesn't require first a conviction for a sex offense?

MR. QUINLIVAN: I'm not sure. I can't point your Honor to any other state that --

THE COURT: That's what you say, right? This is the only one that doesn't piggyback off of a criminal conviction for a sex offender?

MS. MIZNER: The only statute in what sense, your Honor?

THE COURT: A sexually dangerous commitment statute that doesn't first have a predicate of a conviction for a sexually dangerous defendant?

MS. MIZNER: Well, this is the only federal --

THE COURT: No, I'm talking about if you look at the state statutes.

MS. MIZNER: I believe that's true.

MR. QUINLIVAN: I think that there are a few, and I have been informed both North Dakota and Illinois also, and I'd be happy to provide some additional information.

THE COURT: So you don't have to be there pending a charge on sexually dangerous?

MR. QUINLIVAN: That's right.

THE COURT: All right. So do you want to address necessary and proper?

MR. QUINLIVAN: Certainly, certainly, and let me make two arguments with respect to that because I begin with, again, one of the categories of people who are subject

to certification is very much akin to what the Supreme Court upheld in Greenwood, in the sense that what the Supreme Court said in Greenwood is, when you have somebody who the government's power to prosecute has not yet been exhausted, the government has the necessary and proper authority to hold that person. And while it may be true that the majority of the people who have been certified to date are people who are in BOP custody rather than people who under 4241(d) have been determined to be mentally incompetent to stand trial, that is one of the categories of people who can be certified under the statute. So we would submit that again applying the Salerno test, that is in itself sufficient to defeat the facial challenge.

More broadly, I would point out, your Honor, that --

THE COURT: So you're saying Salerno doesn't allow you to do a facial challenge if one large portion of the people who are being affected would be affected across the board?

MR. QUINLIVAN: Absolutely, and the two exceptions being --

THE COURT: By category, I mean --

MR. QUINLIVAN: That's right, that's right, and the two exceptions that the Supreme Court has announced that has expressly held where Salerno doesn't apply, or

implicitly has said that Salerno doesn't apply, is either the First Amendment context or the abortion context. And in fact there was a debate between Justice Stevens and Justice Scalia in the ADA case arising from Hawaii several years ago where Justice Scalia was arguing that the Salerno test should apply in the abortion context, and Justice Stevens was arguing that the Salerno test should not apply at all.

We're not dealing with either of those situations here, and I think Judge Tauro correctly noted that that's why it doesn't apply here. And even if there's some doubt, what the Supreme Court has repeatedly said, and I cite the Agostini V. Felton case, is that if a Supreme Court authority stands and yet somebody argues, "Well, subsequent a Supreme Court authority has called that into question," you leave it to the Supreme Court to overrule its prior authorities.

THE COURT: So going back to Goldberg V. Kelly, the old procedural due process nugget, so you would argue you could never have a facial challenge to a statute that permitted you to take away something that was protected without a hearing simply because an agency might on its own decide not to do it that way?

MR. QUINLIVAN: I think that's right. I mean, I think that's why facial challenges are disfavored. I mean,

I think you want to have -- courts generally want to have a concrete set of facts before them before making those kinds of weighty constitutional determinations.

THE COURT: Could I say, across the board, it is unconstitutional to keep someone past his prison term unless a neutral fact-finder has found within a relatively brief amount of time, whatever you want to call that, that there's probable cause to believe they're sex offenders?

MR. QUINLIVAN: Well, I don't think your Honor -- I would argue that your Honor should not so hold because in a facial challenge, we know there can be situations where that determination can be made prior to any period your Honor could determine. I think that you do --

THE COURT: Although in fact it never has, right, of the 53?

MR. QUINLIVAN: That's right because, quite frankly, in almost all of these cases, we're sort of in the same procedural posture we are with this Court, which is, it's been decided largely from the respondent's side that they want to go forward with the constitutional challenges first.

THE COURT: Now, on the treatment end, can you make a proffer one way or another whether or not Devens plans to treat these people?

MR. QUINLIVAN: I can't make a proffer. All I can

say is that the statute itself makes two provisions. One is that, as your Honor noted it, it says that an attempt will be made to have the states take these people, which I think is something that should be taken into account with respect to the federalism issue. And then I would just note that, again, we don't have a situation where anyone in fact has been committed.

THE COURT: Can I play this out? So let's say the states took them. Who then has the obligation to review the commitment?

MR. QUINLIVAN: Well, I think ultimately it would be -- you would still be in a situation where they've been committed by a Federal Court, and the Federal Court would have the obligation to review it.

THE COURT: And there's no periodic review, right? How does that review process go after the fact? The inmates or the petitioner can't petition more frequently than every six months or something like that, right? How does the review process go at the back end?

MR. QUINLIVAN: It's every year there are periodic reports, and the respondent can petition at any time.

THE COURT: So you would envision -- like, say, Bridgewater is our state facility -- you would envision what would happen here is, if Bridgewater took these people, Bridgewater would send me a report every year or would send

the Bureau of Prisons a report every year?

MR. QUINLIVAN: I think it would be the Bureau of Prisons would be sending a report, but they obviously would be consulting with the people --

THE COURT: And that's it, so it would just be a report. There wouldn't be actually a hearing?

MR. QUINLIVAN: Well, I think that's all that's required, but, again, at any time the respondent has the ability to ask for a hearing.

THE COURT: In one of the statutes that went to the Supreme Court, the court actually had to make a finding year by year, and I think that's not here, right?

MR. QUINLIVAN: That's not here. I would say just in response to my sister's argument about -- I think, you know, we pointed out on the Tenth Amendment that private individuals have no standing to make a Tenth Amendment claim. But I think there is one point where the Tenth Amendment would come into play, and that was the suggestion that somehow the federal government should, you know, force the states to take these people if the federal government has a concern. That's where you would have a federal commandeering. I mean, the federal government, we can petition, we can request the states. Your Honor knows I have another matter in front of your Honor where that very issue is going forward, but the federal government can't

force the states.

THE COURT: What is that? Which one?

MR. QUINLIVAN: It's the Mr. Phelps matter trying to get him into the Vermont facility.

THE COURT: Oh, Phelps.

MR. QUINLIVAN: So it presents -- and I just use that as an example, but that's a situation in which the Bureau of Prisons is trying to have a state facility take custody, and it's something that the Bureau of Prisons can request but ultimately can't force the state.

THE COURT: So that's a good example. Suppose you were to not get a state to agree to it. Why should they after all, it costs them money? So would Fort Devens be providing treatment?

MR. QUINLIVAN: Fort Devens, in those situations, yes, it would have to be the Federal Medical Center that would be providing treatment.

THE COURT: So is it the federal government's representation that there would be treatment?

MR. QUINLIVAN: Yes. Now, I can't represent to the Court what that treatment will be.

THE COURT: Are there plans or is it in the regulations to come up with a game plan for treatment?

MR. QUINLIVAN: Your Honor, if I could have just one moment.

(Pause.)

MR. QUINLIVAN: Your Honor, Ms. Hong is actually much more familiar with this particular aspect.

THE COURT: I would be delighted to hear from her.

MS. HONG: Good afternoon, your Honor. With regard to treatment, the statute actually provides that a person may be discharged if they are no longer sexually dangerous, one, or, second, if on a prescribed regimen of medication or treatment the person would no longer be sexually dangerous. The statute contemplates that if a person can get better with treatment, that they shall be released. That implicitly suggests, and you may infer from that, that treatment would be provided to persons who --

THE COURT: Do you work with Justice now?

MS. HONG: I work in Main Justice in the Civil Division in federal program regs, your Honor.

THE COURT: So are you working with the Bureau of Prisons to develop such a treatment program?

MS. HONG: I'm not part of the Bureau of Prisons. I've been working with Bureau of Prisons to understand the sort of statutory scheme and regulations that they have in place.

THE COURT: Are there any plans to create that kind of a --

MS. HONG: You know, I don't know that there are

federal regulations that are being proposed right now. The Bureau of Prisons is taking it one step at a time. The first fed regs that were issued in the NPRM in August --

THE COURT: Somebody here wants to talk to you very badly.

(Discussion off the record.)

THE COURT: You know what, I think this might be better done through a letter afterwards or something like that.

MR. QUINLIVAN: Yes, certainly, your Honor.

THE COURT: Do you want to respond at all?

MS. MIZNER: Sure. In terms of the defendant's or the committee's right to seek release, he can or she can request a hearing to determine whether the person shall be discharged, but not within six months of a court determination that the commitment shall continue, and there is no rights to an annual hearing as there is in connection with other statutes. There's a report, that's it. If the court then continues the commitment, the person cannot seek release within six months of that date under the statute, under 4247.

THE COURT: Is that unusual among the state statutes?

MS. MIZNER: I believe so, your Honor. I don't have a listing of all of the state release procedures. I've

got a compilation of which require beyond a reasonable doubt which require jury trials, but I can get that information.

THE COURT: Your brother represented that North Dakota and Illinois don't first require a conviction for a sex offense to trigger the commitment statute. Do you know one way or another?

MS. MIZNER: I will check that. Illinois does require proof beyond a reasonable doubt. North Dakota does require a probable cause hearing. I'm not sure whether or not -- I will check that.

THE COURT: All right, is there anything else that you wanted to respond to? The briefing was so outstanding that it's hard to believe --

MS. MIZNER: Well, I have the Federal Register citation for the Court. It's 72 Federal Register at 43205.

And in terms of Addington, I would note that we're talking there about a state civil commitment statute, and in Addington, the Texas statute did provide for a trial by jury. And the court in upholding the clear and convincing standard talked a lot about the state's interest and responsibility in parens patriae as opposed, I would argue, distinguishable from the federal interest which is much more limited. They're talking about the state's interest.

They also note the stigma attached and the severe restriction on liberty, but I think part of the basis for

the decision in Addington is the nature of the decision that is being made. The court said that "How can you make this predictive finding beyond a reasonable doubt?" which I think is one of the problems with this whole area in terms of the predictive findings, which raises the issue that was not addressed, it was not raised, I don't believe, in the North Carolina proceedings, and --

THE COURT: So this is the psychiatrist who said it's impossible?

MS. MIZNER: Right.

THE COURT: You're raising it, and you preserved it.

MS. MIZNER: Okay.

THE COURT: The issue is, really, Congress has found and the Supreme Court has found and basically every court has said that you can make certain predictions; and while psychiatry isn't perfect, it doesn't mean you have to release everybody.

MS. MIZNER: Sure, and a lot of those were pre-Daubert, and we're saying that Daubert set certain gatekeeping standards for the kinds of evidence that --

THE COURT: Now, that's what I think needs to be done in this case by case.

MS. MIZNER: -- that the court can hear. The purpose of this was to raise before the Court Dr. Kriegman's

position that there is no set of circumstances under which the evidence can meet the Daubert standard. Therefore, that would make it a facial challenge. And in terms of the facial challenge --

THE COURT: That's essentially invalidating Congress' finding that you can make that prediction.

MS. MIZNER: Saying that the state of the science at this particular point in time is such that it cannot meet the standard that Congress set. Congress set a standard, said that you have to establish by clear and convincing evidence that this is a danger.

THE COURT: Suppose -- go back to my parade of horribles -- you have a guy who's got two or three prior convictions for touching, and he's told somebody that he can't control himself in a credible way, a staff psychiatrist, somebody, or a probation officer. Why can't you say that's enough for clear and convincing?

MS. MIZNER: Well, that's an admission. If you're saying that that's an admission by the person, that's different from -- that's a different kind of evidence from someone saying, "I'm giving someone the Static-99, and I am concluding from that that this person poses a future danger."

THE COURT: So eliminate the admission. Some person has raped a little girl four times, a different

little girl each time he gets out. You can make predictive forces about that.

MS. MIZNER: Well, I suppose that would also depend on what kind of treatment was provided and how you view the efficacy of any treatment that was provided during the last one.

THE COURT: I'm just simply saying -- you've made the point -- I'm not likely to go off that way, but I am definitely going to think about these other issues. But let me just simply say this: I am worried that this is taking so long and I've got these three individuals. I have no idea what their backgrounds are. I have no idea if probable cause would be a slam dunk for the government or whether it wouldn't be. I have no idea what a probable cause hearing would even look like other than it's got to be either by me or a magistrate judge or somebody who will look at it. I think under the statute, I don't see any reason why a magistrate judge couldn't be the one. They're the ones who make the preliminary bail hearings as well as the preliminary findings on a probation revocation, so I see no reason why constitutionally, for a probable cause kind of hearing, it couldn't be a magistrate judge. But most importantly, I just want to know if you want it, so that while this is being briefed and written by me and resolved by the First Circuit, maybe the Supreme Court, these people

aren't just sitting there, if there's not enough to even hold the probable cause. Or, for that matter, I wondered whether you'd have a whole hearing subject to your constitutional challenges, and then you could challenge it all as it was all going up to the appellate systems. I mean, my guess is, there's going to be a First Circuit ruling and a Fourth Circuit ruling and at some point maybe a Supreme Court ruling. I mean, I've just got to assume that that's true, right? That at least the two circuits will rule. And so if there's a split in that, I imagine there will be a Supreme Court ruling. So I just don't want while all this is happening their rights not to be respected. Maybe they won't be found by even the clear and convincing standard to be posing a threat. So would you please think about that because we can do this on a double track.

MR. FICK: I think that's right. Now that the briefing at least of these big issues, so to speak, is done, I think we would like to proceed, at least begin to proceed to actual hearings. Whether we do it in two steps with a probable cause hearing immediately or in a very short time followed by a big hearing, or whether we go straight to the big hearing, we need to sit down and talk about that with our clients and among ourselves.

THE COURT: Are they all my cases, or did I take a couple of others? Do you remember?

MS. KELLEY: This is all the cases you have as far as I know.

THE COURT: I took them as MBDs, and one apparently got drawn to Judge Tauro, and I don't know if there are others out there and what's happening to them.

MS. KELLEY: Judge Tauro has two, Judge Wolf has one, Judge O'Toole has one. We're filing essentially an identical motion, the constitutional challenging each of the cases. But if I may, your Honor, we would very much like to proceed to the hearings, and, of course, I have to speak with the clients further about this. And to that end, we have exchanged some limited discovery letters. We expect to file a final letter with the government within the next, say, two weeks. When we get their response, I think we're going to just come to the Court then with any disputes we have, and we will then be ready to begin the process of getting to the individual hearings, which, as your Honor noted, we are imagining will be like bench trials.

THE COURT: Well, why don't I hold, for want of a better word, a status hearing in two weeks. Does that make some sense? And you can talk with your clients. You, the government, can figure out what you want to do. Have any of these actually gone through a commitment proceeding yet?

MS. HONG: Not yet, your Honor.

MR. QUINLIVAN: No.

MS. HONG: They're all in the same procedural postures.

THE COURT: My goal will be to set a date for either a probable cause hearing or the final hearing, or both, and we can talk about what that would look like procedurally while I'm doing this piece of it.

MS. KELLEY: Well, one thing we would be asking the Court to do, I think, at this next date is to appoint the expert as the statute requires, and then we do have this 70-day or 75-day clock running for the expert. I mean, as we all know --

THE COURT: Now you're behind. Just give me a proposed order and I'll -- who do you want? Do you have somebody?

MS. KELLEY: Well, we've already been discussing that with the government, and we will have an order ready for you shortly.

THE COURT: If you agree, I agree.

MS. KELLEY: Great.

THE COURT: If you don't, I'll deal with it in two weeks. Does that seem fair to you?

MS. KELLEY: Yes. I mean, just, also, we really appreciate the Court's concern over the time period here. Everything Mr. Quinlivan said about our concessions about the probable cause, et cetera, are completely accurate. But

the clients, as your Honor is intuiting, are really wanting to get to their hearings now. So we're prepared for that, and I think a two-week status date is a wonderful idea.

THE COURT: Okay, so my plan is, nobody's waiving anything. We're going to be on two tracks here. One is resolving these individual people's problem, and the second is handling the facial challenges to the statute and the standards of proof and the like. And I may make certain judgments in the course of individual hearings, and obviously one side or the other will object, and then the whole thing can go up on a record too. So we're just going to jump start this at this point, and I think that's in everyone's interest. Are they all local at this point still? They're not down in North Carolina, right? They're all in Devens?

MS. MIZNER: That's correct, your Honor.

MS. KELLEY: All of the people who were certified in this district are being held in Devens. There's nobody out of district.

THE COURT: Good. So two weeks. Robert, when should we do it?

THE CLERK: October 1 at 3:00 p.m.

THE COURT: And, now, 75 days, I'm sure I had a resonance of people because it probably sounded like a Speedy Trial Act. So my thought would be that we would be

trying it before year end. Now, can I do three of them? I don't know. I don't know. I've got to assume you don't want to do them all together.

MS. KELLEY: Well, we have several other issues to litigate prior to the hearings; for example, the use of their treatment records. It's my understanding the discovery is not yet complete, but the men who were in the treatment center at Butner signed release forms before the SDP law was in effect, so they had no idea the release form they were signing was going to be used -- the records were then going to be used to commit them for life. So we're going to be challenging the introduction of some of their records at the hearings and so on. And there's also issues. Mr. Wetmore was interviewed and made some admissions to the people who interviewed him as part of the certification process. He asked for a lawyer, which was denied, so we're going to need to litigate that, although if the process is not criminal, that may be a short part of the litigation. But, at any rate, we do have some --

THE COURT: You need to preserve everything.

MS. KELLEY: Yes, yes.

THE COURT: But even once we get past all that, the issue is also, from the government's point of view, whether I should -- if there's anything objectionable to doing an advisory jury or whether I should do it myself.

These were the most hated parts of state court jurisdiction, let me just say it. It's a very difficult thing to make predictions, and it might be useful to have an advisory jury, but I'm not sure whether, A, I can, or, B, I will. So let's just think about all these issues as we go through it.

MR. FICK: Your Honor, I'm sorry to jump backwards, but I wanted to answer a question you asked earlier, and that was, had there been any commitments of people who had no touching offenses? And one of my clients in front of Judge O'Toole has predicates of only interstate travel to meet a cop and child pornography. So to answer the question, yes, we know of at least one case in which there was no touching offense.

THE COURT: Thank you. My guess is, there was a transcript there that was hurtful to your client, right, what he wanted to do?

MR. FICK: At this point, frankly, I don't know. Yes, there was certainly an Internet talk between these people; but, you know, talk is cheap, and it's not a touching offense, so that's what the bottom line is.

THE COURT: Thank you. That's useful to know. Anything else?

MS. MIZNER: I'd just like to submit a letter or a short memo to the Court addressing some of the questions on severability, jury trial, and --

THE COURT: Yes, that's the one that just -- I don't do that many of these, and so obviously the one thing the Supreme Court keeps insisting on is appropriate procedural and evidentiary mechanisms. And I don't know if I say, "Well, this isn't good, this isn't good." Can I just do my little checklist and just say "Do it"? Or do I say to the Justice Department/BOP, "Do it," by regulation or by fiat? Or do I have to say to Congress, "This isn't good enough, and it goes to the heart of what you're doing, and therefore the whole statute is unconstitutional"? That's the piece that I'm worrying about, and I don't know what the answer is, and I don't get this that often, thank goodness.

MS. MIZNER: We'll try to address that.

MR. QUINLIVAN: And we will as well, your Honor.

THE COURT: Thank you. That would be very useful. I think the last time I had something like this it was the Dairy Compact, so it was a little more complex. Anyway, thank you very much.

THE COURT: Can you do that like within a week?

MS. MIZNER: Yes, your Honor.

MR. QUINLIVAN: Yes.

THE COURT: And if you need a few more days, just let us know.

MR. QUINLIVAN: Certainly.

(Adjourned, 4:30 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 61 inclusive, was recorded by me stenographically at the time and place aforesaid in MC No. 06-10427, United States of America V. Jeffrey Shields, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this 12th day of May, 2009.

/s/ Lee A. Marzilli
_____
LEE A. MARZILLI, RPR, CRR
OFFICIAL COURT REPORTER